SUPREME COURT, U.S.
FILED
MAR 5 1992
OFFICE OF THE CLERK

(15) (15)

Nos. 91-155, 91-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH,
Petitioners and Cross-Respondents,

v.

WALTER LEE, Superintendent of Port Authority Police,
Respondent and Cross-Petitioner.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT/CROSS-PETITIONER WALTER LEE

Benjamin J. Brown
Counsel of Record
National Institute of
Municipal Law Officers
1000 Connecticut Avenue, N.W.
Suite 902
Washington, D.C. 20036
(202) 466-5424
(Attorneys continued on inside cover)

BEST AVAILABLE COPY

[redacted]
City Attorney
P.O. Box [redacted]
Ft. Worth, TX 76114

Robert J. Aldis
City Attorney
A. Noel Rominger, Comm.
300 South Sixth Street
Minneapolis, MN 55487

Joseph L. Anderson
Town Counsel of Plymouth
Kopelman & Paige
101 Arch Street
Boston, MA 02110

Frank B. Gumney, III
City Attorney
P.O. Box 2455
Daytona Beach, FL 32115

William I. Thornton, Jr.
City Attorney
101 City Hall
Durham, NC 27702

Frederick S. Dunn
City Attorney
P.O. Box 27210
Tucson, AZ 85726

Neal M. Janey
City Solicitor
City Hall, Room 101
100 N. Holliday Street
Baltimore, MD 21202

[redacted]
City Attorney
[redacted]
[redacted]

William J. Cowen, Jr.
Township Solicitor
215 Dutton Road
Wallington, NJ 07057

Patricia A. Lynch
City Attorney
City Hall
P.O. Box 1900
Kent, WA 98035

Robert J. Shaffer
Corporation Counsel
City of Newton
Newton, MA 02158

[redacted]
City Attorney
[redacted]
Palm Bay, FL 32905

[redacted]
City Attorney
[redacted]
[redacted]
Overland Park, KS 66212

John J. Hamilton
Attorney for Municipalities
525 South Vine Street
Park Ridge, IL 60068

Iris J. Jones
Austin, Texas

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INTEREST OF THE *AMICUS CURIAE*

The National Institute of Municipal Law Officers (NIMLO) is a non-profit, non-partisan organization, consisting of over 1,400 local governments and their city

attorneys. NIMLO is dedicated to gathering and disseminating information on the most recent legal developments affecting municipalities.[1] NIMLO has a vital interest in the outcome of this case because many NIMLO members operate airports and other facilities devoted solely to transportation, such as mass transit systems.

As public-sector attorneys, NIMLO members recognize the importance of First Amendment expression and carefully weigh a municipality's attempt to restrict expressive activity. At the same time, as operators of special-purpose facilities similar to those at issue in this case, NIMLO members take the position that the Port Authority's restriction of repetitive solicitation and leafletting at its airports is reasonable and viewpoint-neutral.

Petitioners in this case seek to persuade this Court that airports are public fora by making an analogy to sidewalks and streets. Petitioners' argument ignores the specialized purpose of airports – to facilitate the movement of air passengers and air cargo – which distinguishes them from traditional public fora. This brief examines the case law applying the public forum doctrine and demonstrates why airports are particularly ill-suited to be places for expressive activity and why they should be considered non-public fora.

STATEMENT OF THE CASE

This brief argues that the Second Circuit was correct in finding that airports are not public fora in accordance with the plurality opinion in *United States v. Kokinda*, 110 S.Ct.

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[1] Letters of consent by the parties to the filing of this brief *amicus curiae* have been served on the Court pursuant to Rule 37.3.

3115 (1990). Even more than the postal sidewalk in *Kokinda* used by postal service patrons, airports serve a special function in sharp contrast to traditional public fora. The regulation of solicitation and leafletting at airports is uniquely designed to further the purpose of airports--to facilitate the timely arrival and departure of air passengers.

The decision of the Second Circuit holding that the Port Authority airports were not public fora[2] and upholding the regulation of solicitation at the airports should be affirmed. The part of the decision striking down the regulation of leafletting at the Port Authority airports should be reversed, because leafletting, like solicitation, disrupts the flow of pedestrian traffic, and its regulation by airport operators is reasonable in light of the special function served by airports.

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[2] In a subsequent decision by the Second Circuit, *Longo v. United States Postal Service*, ___ F.2d ___, 1992 W.L. 3512 (2d Cir. Jan. 13, 1992), the court, per Judge Timbers, stated in dictum that in *International Society for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576 (2d Cir. 1991) (*ISKCON*), the Second Circuit did not reach the issue of whether airport terminals are traditional, designated or nonpublic fora. 1992 W.L. 3512 at 6. However, the dictum in *Longo* notwithstanding, and contrary to the assertion in the *Amici Curiae* Brief of the American Newspaper Publishers Assoc., *et al.*, in *ISKCON*, the Second Circuit applied the analytic framework used by the plurality in *Kokinda* to hold that the Port Authority airports were not public fora. (PA 13); *see Amici Curiae* Brief, American Newspapers Publishers Assoc., *et al.* at 2. Referring to previous decisions in other circuits which held that airports were public fora, *e.g. Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), the court stated: "We believe, however, that *Kokinda*, has altered public forum analysis and that we would not be faithful to Supreme Court precedent if we were to follow the other circuits." (PA 10-11).

SUMMARY OF ARGUMENT

The public forum doctrine, as set forth in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), is the analytic framework which this Court has used to balance the interests of the individual in expressive activity against the interests of the government in regulating such activity on its property. The *Perry* model weighs the significance of the government's interest by examining the nature and purpose of the forum where the speech activity would take place. 460 U.S. at 45-46.

Under *Perry*, courts apply a sliding scale to assess the permissibility of regulation of First Amendment activity on government property: in a traditional or designated public forum, the government must show that any content-based exclusion of speech activity is necessary to serve a compelling state interest. For a content-neutral regulation to be valid, it must be narrowly tailored to serve a significant interest and leave open alternative means of communication. *Perry*, 460 U.S. at 45. On the other hand, in a non-public forum, the government's regulation of speech, to reserve the forum for its intended purpose, will be upheld if the regulation is reasonable and viewpoint-neutral. 460 U.S. at 46. The balancing test which is at the heart of public forum analysis fits neatly within the long tradition of First Amendment jurisprudence which weighs the individual's First Amendment rights in a democracy against society's interest in maintaining public order. *See Cox v. Louisiana*, 379 U.S. 536, 554 (1965).

In the present case, the Port Authority's regulation of solicitation and leafletting preserves the airports for their intended purpose. The Port Authority's interest in maintaining safe, orderly airports outweighs the restriction on petitioners' First Amendment rights caused by the Port

Authority's regulation of solicitation and leafletting.[3] The Second Circuit correctly concluded that where the government dedicates a public facility like an airport for the sole purpose of air transportation, the airport may promulgate reasonable, non-discriminatory regulations on solicitation activity. (PA 13-15). The Second Circuit's finding that the regulation of in-person solicitation at airports was reasonable finds ample support in the record.

However, the Court of Appeals erred in striking down the Port Authority's restriction on leafletting at the airports. Pedestrian congestion and bottlenecks due to poor weather conditions and other unpredictable variables that accompany air travel, are particularly acute at the nation's airports. (JA 456). As petitioners themselves concede in their Petition for A Writ of Certiorari, "(l)iterature distribution, permitted under the court of appeals' decision, might well be as disruptive to a traveller 'hurrying to catch a plane or to arrange ground transportation', App. 14, *ISKCON* 925 F.2d at 582, as a request for a voluntary donation." Petitioners' Writ of Certiorari, p. 22. If a passenger misses his/her plane by a matter of seconds, waiting time for the next available flight can vary from less than an hour to many hours. (JA 455). The Port Authority's restriction on leafletting is reasonable given the peculiar function of airports as a transit point for air passengers. In addition, the Port Authority's restriction on leafletting is valid because it does not discriminate based on the viewpoint of the speaker, but applies evenhandedly as does the ban on solicitation.

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[3] The Port Authority's prohibition against solicitation and leafletting, applies only to the "interior areas" of the Port Authority airports. However, it is NIMLO's position that airport sidewalks as well as airport interior areas are not public fora. *See United States v. Kokinda* 110 S. Ct. 3115 (1990).

ARGUMENT

I. AIRPORTS ARE NOT PUBLIC FORA, BECAUSE THEIR PURPOSE IS TO FACILITATE THE MOVEMENT OF AIR PASSENGERS AND CARGO, AND THEY HAVE NOT TRADITIONALLY BEEN OPEN TO THE PUBLIC FOR EXPRESSIVE ACTIVITY

By tradition and purpose, airports are not gathering places for casual passersby; rather, they are uniquely designed to expedite the safe and orderly movement of air passengers and air cargo. (JA 465).

Petitioners, who engage in fund-raising and leafletting as part of their religious practice of *sankirtan*, commenced this action to challenge the Port Authority's ban on repetitive solicitation and distribution of literature at the airports. (JA 34-35). This Court has long recognized that solicitation and the distribution of literature are protected speech. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 629 (1980) ("(S)oliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech..."); *Perry*, 460 U.S. 37 (1983).

But this Court has also long held that government ownership of property does not automatically open that property to the public for expressive activity, particularly where, as here, the government is providing a specific service to the public by operating a special-purpose facility. *Kokinda*, 110 S.Ct. at 3119 (1990) (holding that solicitation could be prohibited on postal service sidewalk); *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114 (1981) (holding that the Postal Service could prohibit the placing of non-mailed literature in a letter box); *Greer v. Spock*, 424 U.S. 828 (1976) (holding

that political campaigning and the distribution of literature could be restricted at a military base). In the present case, the Second Circuit correctly found that airports are not public fora, because they have not been open to the public for expressive activity, but rather are designed solely to meet the transportation needs of the air passengers who use them. (PA 14-15).

Less than two years ago, a plurality of this Court held in *Kokinda* that a sidewalk adjoining a post office was not a public forum because the Postal Service had not expressly dedicated its sidewalks to any expressive activity. Rather, the sidewalk was intended for the sole use of postal service patrons. 110 S. Ct. at 3120. In so holding, Justice O'Connor, speaking for the plurality, employed the tripartite framework first used in *Perry*, 460 U.S. 37 (1983), to assess how and to what extent First Amendment activities may be regulated on government property.

In *Perry*, the Court found that the regulation of speech on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, should be examined under the strict scrutiny standard. 460 U.S. at 45.[4] The same standard applies where the government has designated a forum for speech activity. *Id.; see Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a state university which had an express policy of making its meeting facilities available to registered student groups had created a public forum for their use); *Kokinda*, 110 S. Ct. at 3119.

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[4] In a traditional public forum, only content-neutral time, place and manner regulations that are narrowly tailored to serve a significant government interest and leave open ample alternative means of communication may be imposed. *Perry*, 460 U.S. at 45.

However, where the government has not dedicated its property to First Amendment activity, its regulation of speech activity will be upheld if it is reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46; *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 800 (1985). The three-tiered framework of public forum analysis employs a series of balancing tests, which weighs the government's interest according to the particular function of the forum where the speech activity is proposed to take place. The Court logically applies the lesser standard of "reasonableness" where the forum is determined to be nonpublic because it is used for a specific purpose. *See Kokinda*, 110 S. Ct. at 3120.

The balancing of interests which the Court must weigh in public forum analysis is a hallmark of First Amendment jurisprudence.[5] As this Court said in *Cox v. Louisiana*, 379 U.S. 536, 554 (1965):

> The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.

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5 *Amicus curiae* American Civil Liberties Union (hereinafter "A.C.L.U.") asserts in error that the public forum doctrine is not grounded in the First Amendment, even though the balancing tests used in public forum analysis are widely employed in First Amendment cases. Brief of A.C.L.U. at 7.

To date, the Supreme Court has had only one occasion to apply the public forum doctrine to a transportation system. In that case, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the Court held that advertising space on a city transit system was not a public forum, and upheld the city's ban on political advertising.

In the present case, the Port Authority's interest in the orderly movement of air travellers at its airports clearly outweighs the restriction on petitioners' rights caused by the regulation of solicitation and leafletting. Petitioners contend that the mere presence of stores and shops in the airports to serve air passengers render airports public fora. Petitioners' Brief at 17. As this Court has repeatedly held, "(t)he mere physical characteristics of the (government) property cannot dictate forum analysis." *Kokinda*, 110 S. Ct. at 3120. Rather, the location and purpose of the public facility determine whether or not it is a public forum. *Kokinda*, 110 S.Ct. at 3121.

As the Second Circuit correctly found, although airport terminals are generally "open to the public, virtually everyone who enters the terminal does so for a purpose related to air travel. These include travelers, persons meeting or seeing off passengers, members of flight crews, and employees of the terminal, an airline or business in the terminal." (PA 5). As set forth in the affidavit of Morris Sloane, former Director of Aviation Operations for the Port Authority: "The only purpose of all three of the Port Authority airports is the facilitation of air passenger and air cargo transportation." (JA 464). The commercial establishments found in airport concourses are designed to serve the needs of waiting air passengers and other airport users, such as airline employees. (JA 453-454). Airports thus stand at the opposite side of the spectrum from the quintessential public fora-- public streets and parks which

make up "the daily commerce and life of the neighborhood or city." *Kokinda,* 110 S.Ct. at 3120.

In *Kokinda,* the Court ruled that the Postal Service could prohibit solicitation on public property because postal service property was not intended for expressive activity for the general public, but was intended to serve the needs of postal patrons. The Court reasoned that:

> The postal sidewalk at issue does not have the characteristics of public sidewalks traditionally open to expressive activity. The municipal sidewalk that runs parallel to the road in this case is a public passageway. The Postal Service's sidewalk is not such a thoroughfare. Rather, it leads from the parking area to the front door of the post office. Unlike the public street described in *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.,* 452 U.S. 640 (1981), which was "continually open, often uncongested, and constitute(d) not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people (could) enjoy the open air or the company of friends and neighbors in a relaxed environment," *id.* at 651, 101 S. Ct. at 2566, the postal sidewalk was constructed solely to provide for the passage of individuals engaged in postal business. The sidewalk leading to the entry of the post office is not the traditional public forum sidewalk referred to in *Perry.*

110 S. Ct. at 3120.

Airport sidewalks and interior spaces are also not "traditional public sidewalks," but are more akin to the streets and sidewalks found in a military installation described in *Greer v. Spock,* 424 U.S. 828 (1976). In that

case, this Court upheld Fort Dix regulations governing political campaigning and the distribution of literature, even though civilians had access to unrestricted areas of the military reservation. In so holding, the Court reasoned:

> The guarantees of the First Amendment have never meant "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *Adderley v. Florida,* 385 U.S. 39, 48, 17 L Ed 2d 149, 87 S Ct 242. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.,* at 47, 17 L Ed 2d 149, 87 S Ct 242.

424 U.S. at 836.

> The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false.

424 U.S. at 838.

More stringent than the security measures described in *Greer* at the Fort Dix military base, 424 U.S. at 830, airports, particularly over the course of the last two decades, have taken steps to restrict access to parts of airport terminals to ticketed air passengers only. (JA 459). Federal regulations require the screening of air passengers. (JA 459). The presence of persons soliciting and leafletting who have no connection to air travel complicates the task of airport operators in providing for the safety and security of air travellers.

Further, like persons waiting in line at the local post office, airport users are a captive audience for unwanted solicitation. (JA 458). As Justice Kennedy said in his concurring opinion in *Kokinda*: "Many of those who use postal facilities do so from necessity, not choice." 110 S. Ct. at 3125. The lack of choice for waiting air passengers is more apparent and more compelling, particularly air travellers in peak travel periods or during inclement weather, whose confinement is more prolonged and more confined than a person using a postal sidewalk. As Mr. Sloane points out: "Persons waiting to purchase airline tickets, to pick up baggage, to make car rental or other ground transportation arrangements, to go through security checks, at telephones, and at eating concessions, tend to remain in the area in which they are located to complete their transaction." (JA 458).

In fact, as set forth in the 3(g) Statement of the Superintendent of Port Authority Police:

> The airport terminal concourses are not used as thoroughfares to or from destinations within the surrounding communities, nor as gathering places for community activities. Virtually all of the persons in the airport terminals are passengers, "meeters and greeters", or employees of airlines, of airline contractors, of the Port Authority, of the federal inspection services, or other airport-related businesses or enterprises for travel-related purposes.

(JA 458) (paragraph numbers and cross-references omitted).

Thus, airport sidewalks and concourses are not like the sidewalks surrounding the Supreme Court, which this

Court held in *United States v. Grace*, 461 U.S. 171 (1983), to be a public forum. As the Court in *Grace* explained:

> The sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated any differently. Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property. In this respect, the present case differs from *Greer v. Spock, supra*. In *Greer*, the streets and sidewalks at issue were located within an enclosed military reservation, Fort Dix, N.J., and were thus separated from the streets and sidewalks of any municipality. That is not true of the sidewalks surrounding the Court. There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave.

461 U.S. at 179-80 (footnotes omitted).

Nor does the existence of large concourses, shops, restaurants, and other places designed to serve waiting passengers mean that the airport operator has created a public forum because of opportunities for "limited discourse" among air travellers and others meeting or waiting for arriving passengers. *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. at 802 (1985) (holding that the fund-raising campaign for federal employees was not a public forum to which all fund raising

organizations should have equal access); *Cf. Widmar v. Vincent* , 454 U.S. 263 (1981); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975) (Court found a public forum where a municipal auditorium and a city-leased theater were designed for and dedicated to expressive activities).

The decisions relied upon by petitioners which were rendered by other circuit courts, holding that airports were public fora, have no precedential value, since they all predate this Court's decision in *Kokinda*, which held that a postal sidewalk was not a public forum. *See, e.g., Kuszynski v. City of Oakland,* 479 F.2d 1130 (9th Cir. 1973); *Chicago Area Military Project v. City of Chicago,* 508 F. 2d 921 (7th Cir.), *cert. denied,* 421 U.S. 992 (1975); *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States,* 708 F.2d 760, 765 (D.C. Cir. 1983) (comparing airport terminals to "public thoroughfares"); Petitioners' Brief at 18-19.

Moreover, all of these decisions relied on general physical characteristics such as public ownership and public access which this Court has long held are not dispositive by themselves of whether a facility is a public forum. As this Court recently said in *Kokinda:* "Postal entryways, like the walkways at issue in *Greer,* may be open to the public, but that fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment." 110 S.Ct. at 3121. In addition, because of the similarities between airports and the military installation described in *Greer,* which, as discussed above, are both characterized by physical isolation, security concerns and a special purpose, the circuit court decisions holding that airports are public fora cannot be reconciled with this Court's decision in *Greer,* holding that a military base was not a public forum. 424 U.S. 828, 836-37.

II. THE PORT AUTHORITY'S PROHIBITION OF IN-PERSON SOLICITATION AT PORT AUTHORITY AIRPORTS SHOULD BE UPHELD AS A REASONABLE REGULATION OF A NON-PUBLIC FORUM

It is undisputed that airports are uniquely concerned with the smooth, safe, and expeditious movement of air passengers and air cargo. (JA 453). Mr. Sloane of the Port Authority states that: "Airport pedestrian congestion is the Port Authority airports' single greatest problem." (JA 466). The problem of congestion is not necessarily tied to a particular time of day or time of year. For example, a snowstorm in Chicago may delay departing passengers from Newark Airport to Chicago. A car accident along an access route to Kennedy Airport may leave only a few minutes for a passenger to make his or her flight. In such a case, even if the airport concourse is not crowded, a solicitor who blocks a passenger's path can cause that person to miss her flight.

The Port Authority restriction on solicitation easily meets the test of reasonableness, since it is designed to reduce delays at the airport, and help address the needs of air passengers who often face severe time constraints in catching their flights. *Cornelius v. NAACP Legal Defense and Educational Fund* , 473 U.S. 788, 808 (1985). As this Court said in *Cornelius:* "The Government's decision to restrict access to a nonpublic forum need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation." *Id.* Further, the restriction on solicitation is viewpoint-neutral, since it applies regardless of the identity or viewpoint of the solicitor.

As Lord Dunedin said in *M'Ara v. Magistrates of Edinburgh:* "The truth is that open spaces and public

places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have to know the history of the particular place." (1913) Sess. Cas. 1059, 1073-1074, *cited in Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974). Airports' consistent efforts to regulate solicitation activity underscore the reasonableness of the Port Authority's prohibition of in-person solicitation. Just as the Court in *Kokinda* found that the long-standing history of Postal Service regulation of solicitation in post offices demonstrated the reasonableness of its current regulation, so do the prior efforts of airports to regulate solicitation bear on the reasonableness of the Port Authority regulation in this case. *See Kokinda*, 110 S. Ct. at 3122 (where the Court noted that "(t)he Postal Service has been regulating solicitation at least since 1958"). A brief review of the litigation on solicitation at airports throughout the country reveals that, like the Postal Service, airports have a long history of promulgating such regulations to minimize the disruption to air passengers and other airport-related traffic.

For example, in *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 924 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975), a group challenged an ordinance promulgated by O'Hare Airport, regulating solicitation and leafletting which dated back to June 1, 1956. In addition, the first lawsuits in federal district courts throughout the country challenging existing airport regulations of solicitation appeared as early as 1971. *See Kuszynski v. City of Oakland*, 322 F. Supp. 689 (N.D. Cal. 1971), *rev'd and remanded*, 479 F.2d 1130 (9th Cir. 1973).

Further, like the Postal Service, airports are self-sustaining business entities. *Kokinda*, 110 S. Ct. at 3122 ("Congress has directed the (Postal) Service to become a self-sustaining service industry..."). This characteristic

underscores the proprietary nature of airports[6] and the reasonableness of a restriction on solicitation to minimize disruption to users of the airport's services, and avoid the diversion of revenue away from the airport. *Id.* As set forth in the record, Port Authority airports are financed exclusively by user fees.

Mr. Sloane describes these fees as "rentals paid by airline tenants..., landing, terminal and ramp gate fees paid by individual and corporations for use of the airports..., fees paid by ground transportation providers (such as auto rental agencies and limousine services), fees paid by providers of other passenger services (such as restaurants and shops), and fees paid directly by air passengers (such as parking lot fees)." (JA 454).

As the Second Circuit accurately observed below, airport regulation of solicitation is reasonable, because solicitation is "inherently disruptive" for airport users. (PA 12, 15), *citing Kokinda*, 110 S. Ct. at 3123. The act of solicitation requires the solicitor to intercept potential donors "as they move about, and if success is achieved, stopping them momentarily or for longer periods as money is given or exchanged for literature." *Kokinda*, 110 S. Ct. at 3123. ("Solicitation requires action by those who would respond: the individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card." 110 S.Ct. at 3123.)

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[6] Although the operation of public airports is indeed a governmental function, the Port Authority manages airport services in a proprietary capacity. *See Transport Limo. v. Port Authority of New York*, 571 F.Supp. 576, 581 (S.D.N.Y. 1983).

The flow of the crowd and demands of safety are more pressing in airports than on streets and public sidewalks. (JA 465-466). Thus, restricting solicitation is reasonably aimed at facilitating the flow of pedestrian traffic where a matter of seconds can "cause a traveler to incur substantial loss in travel time..." (JA 455).

III. THE PORT AUTHORITY REGULATION OF REPETITIVE DISTRIBUTION OF LITERATURE IS A REASONABLE, VIEWPOINT-NEUTRAL RESTRICTION

The Second Circuit erred in striking down the Port Autnority's regulation of the repetitive distribution of literature at Port Authority airports. The Court's reasoning appeared to be based on dicta in ***Kokinda***, which indicated that soliciting was a more disruptive activity than leafletting. 110 S.Ct. at 3124. However, a review of airport regulation in this area reveals that airport operators have been as concerned with the inconvenience to air travellers caused by leafletting as they have with solicitation.

For example, in *Chicago Area Military Project v. City of Chicago,* 508 F. 2d 921, 924 (7th Cir.), *cert. denied,* 421 U.S. 992 (1975), O'Hare Airport promulgated an ordinance which prohibited both solicitation and the distribution of literature. It provided that:

> no person shall be permitted to picket, sell anything (except for authorized concessionaires or lessees, and they only at assigned spaces) distribute literature of any nature, or solicit or collect contributions within any building at any airport operated by the City of Chicago.

508 F.2d at 924.

In *Kuszynski v. City of Oakland,* 322 F. Supp. 689 (N.D. Cal. 1971), *rev'd and remanded,* 479 F.2d 1130 (9th Cir. 1973), a group challenged an ordinance at the Oakland airport which restricted the "distribution of non-commercial, non-obscene, non-subversive literature." *Id.* at 1130-1131. In *Fernandes v. Limmer,* 663 F. 2d 619 (5th Cir. 1981), the issue of solicitation and leafletting activities at Dallas-Fort Worth Regional Airport arose in late 1974 when members of ISKCON were arrested for soliciting funds, selling merchandise, and distributing literature in the airport terminal buildings without a permit in violation of airport regulations. 663 F. 2d at 624.

As discussed *supra* at pages 5 and 15, a delay of seconds as air passengers make their way through airport terminals can result in passengers missing their flights. (JA 455). Petitioners concede that the distribution of literature, as air passengers rush to waiting flights or ground transportation, may well be as disruptive as a request for donations. Petitioners' Writ of Certiorari, p. 22. Given the special function served by airports and the time pressures often faced by air travellers, the Port Authority's restriction of leafletting is also reasonable.

The Port Authority's narrow regulation stands in stark contrast to the regulations struck down by this Court in *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569, 574 (1987), which would have barred all expressive activity at Los Angeles Airport. In this case, restricting the repetitive distribution of literature is targeted only at regulating a narrow category of expression that disrupts airport users.

Although leafletting, unlike a request for funds, does not necessarily require an affirmative response on the part of pedestrians at the airport, the presence of leafletters slows the movement of air passengers through the airport.

Leafletting, therefore, interferes with the main aim of the airport--to provide a smooth transit point for air passengers.

Significantly, the only case in which this Court has applied the public forum doctrine to a transportation facility, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), underscores the broad leeway that this Court has granted when the government is providing a service in a nonpublic forum. In *Lehman*, this Court upheld a ban on paid political advertising in a City's rapid transit system, even though the City of Shaker Heights did not claim that mass transit users would face potential delays if such advertising were permitted. It was sufficient for this Court to weigh the city's interest in not offending passengers' sensibilities to uphold the reasonableness of the city's ban. Speaking for a plurality of the Court, Justice Blackmun reasoned:

> Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.

418 U.S. at 304.

Similar to the prohibition in *Lehman*, the Port Authority airports' prohibition on leafletting is not an attempt to suppress a particular viewpoint. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 800. It thus avoids the "sticky administrative problems" referred to in *Lehman* by imposing a prohibition which has no reference to the identity or viewpoint of the speaker. 418 U.S. at 304.

This Court's decision in *Perry*, is in accord. In *Perry*, the Court held that a local school district could bar a rival teachers' union from distributing literature through the interschool mail system. The school district did grant access to the duly elected union representative and certain other outside organizations like the YMCA and parochial schools. 460 U.S. 47-48. Justice White, writing for the Court, reasoned that "(t)his type of selective access does not transform government property into a public forum." 460 U.S. at 47.

In fact, the Court noted, the granting of access to the elected union representative but not to its rival preserved the mail system for the use to which it was lawfully dedicated. *Id.* at 50-51. In the Court's words:

> (W)hen government property is not dedicated to open communication the government may – without further justification – restrict use to those who participate in the forum's official business.

460 U.S. at 53. Similarly, the restriction of leafletting at Port Authority airports preserves the airports for their lawfully intended purpose – the safe and expeditious movement of air passengers and air cargo.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Second Circuit Court of Appeals should be: (1) affirmed with respect to the court's ruling that the Port Authority airports are public fora and that the Port Authority can restrict solicitation at its airports; and (2) reversed with respect to the court's ruling that the Port Authority's restriction on leafletting at Port Authority airports violates the First Amendment.

Respectfully submitted,

BENJAMIN L. BROWN
Counsel of Record
National Institute of
Municipal Law Officers
1000 Connecticut Avenue, N.W.
Suite 902
Washington, D.C. 20036
(202) 466-5424

Dated: March 9, 1992